34574-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARLO CERUTTI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

Insufficient evidence supports the jury verdict insofar as the State failed to establish that Mr. Cerutti committed assault with a deadly weapon.

II. ISSUE PRESENTED

Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of second degree assault was proven beyond a reasonable doubt?

III. STATEMENT OF THE CASE

Procedural history.

The appellant/defendant, Carlo Cerutti, was charged by information in the Spokane County Superior Court with one count of second degree assault with a deadly weapon for an event occurring on November 14, 2015. CP 3. The matter proceeded to trial and the defendant was convicted as charged. CP 79. With an offender score of "9," the defendant was sentenced to a low end standard range sentence of 63 months. CP 147, 149. This appeal timely followed.

Substantive facts.

On November 14, 2015, McGlother Parker lived in a duplex located at 419 East Wabash Avenue in Spokane. RP 49-50. At the time of the incident, the defendant lived in the other half of the duplex. RP 50. Prior to the incident, the police responded to the duplex several times because there

were on-going problems between Mr. Parker, the defendant, and his wife.[1] RP 51. Eventually, Mr. Parker obtained a temporary anti-harassment order against the defendant and his wife on October 16, 2015. RP 51-53, 80.

On the day of the incident, the defendant's wife threw garbage toward Mr. Parker's door. RP 54. Mr. Parker picked up the trash and placed it into the garbage receptacle. RP 54. Moments later, the defendant's wife again flung the recently deposited garbage at Mr. Parker's door. RP 54, 56. On the second occasion, Mr. Parker threw the garbage back at the defendant's wife; however, he did not strike her with it. RP 57.

Predictably, a verbal argument ensued outside between Mr. Parker, the defendant, and several of his friends. RP 57. Mr. Parker remained in his doorway, and the group returned to the Cerutti residence, including the defendant, who spit toward Mr. Parker. RP 57-58.

Shortly thereafter, trash was thrown once more toward Mr. Parker's residence and another verbal altercation followed with the defendant's wife. RP 58. The defendant directed his wife to return inside their residence and he told Mr. Parker to wait by his doorstep. RP 59. Shortly thereafter, the

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[1] Mr. Parker punched the defendant on a prior incident shortly before the grant of the anti-harassment order. RP 70. A verbal argument preceded the "punch" between Mr. Parker and the Ceruttis, at which point the defendant's wife made a racial remark to Mr. Parker. RP 75.

defendant exited his residence and had an object in his hand. RP 59. Mr. Parker was on his porch. RP 60. As described by Mr. Parker:

> He lunged at me first with it. Still -- like I said, I didn't realize what he had in his hand. Then he came down in a chopping motion. I realized this guy has a weapon. He came at me again. I just -- put my hands up kind of (indicating).

RP 59.

Mr. Parker described the weapon as "a sword of some sorts, like a warrior-type battle sword with four blades on it." RP 60. The defendant swung the weapon at Mr. Parker three times, which caused Mr. Parker to jump back. RP 60, 77. Mr. Parker grabbed the weapon and received a cut to his hand. RP 61. Mr. Parker threw the weapon on the ground and returned to his residence, calling 911. RP 54, 61, 67.

Bernard Mallory was visiting a friend on the day of the incident. RP 83. He was outside near his pickup, and observed a heated verbal exchange between the defendant and Mr. Parker.[2] RP 85, 87. The defendant held a sword to his side and then lunged toward Mr. Parker hitting him in the hand. RP 86, 88.[3] Mr. Mallory observed Mr. Parker grab the sword and

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[2] Mr. Mallory was not acquainted with either the defendant or Mr. Parker. RP 83.

[3] At a subsequent "show up," the witness later positively identified the defendant as the person swinging the sword at Mr. Parker. RP 108, 111.

throw it to the ground. RP 86. This witness described the defendant as "aggressive" and "menacing." RP 91; 93.

Blake Johnson was across the street moving furniture on the day of the incident. RP 100-01. Similarly, he observed Mr. Johnson being harassed by the defendant and several other individuals.[4] RP 97-99. Mr. Johnson described the events leading up to the assault:

> Every time he came out they were gathering around him, faking like they were going to punch him. Had his back to them, and one of the men spit on his back. He'd go back in the house. He was really trying not to get involved. The lady was throwing rocks at his door. They threw garbage in the yard.

RP 98.

After the incident and on November 14, 2015, physician's assistant, John Hunter, treated Mr. Parker for a laceration to his left hand. RP 40. The injury required sutures. RP 40. Mr. Parker remarked that the injury was "pretty painful." RP 68.

The defendant alleged Mr. Parker abruptly entered the defendant's residence, and he grabbed the sword off the wall to protect himself. RP 117-18. The defendant denied being out on the sidewalk, swinging the sword at Mr. Parker. RP 119. He further alleged that Mr. Parker grabbed the sword

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[4] Like the previous witness, Mr. Johnson did not know the defendant or the victim. RP 95-96.

while inside the defendant's residence, that the defendant next shoved the sword through the door, dropped it outside, and then closed the door. RP 119.

On cross-examination, the defendant agreed that the sword could cause serious injury and, under the appropriate circumstances, it could cause death. RP 124-25. Moreover, he agreed it was a deadly weapon. RP 125.

IV. ARGUMENT

A. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR SECOND DEGREE ASSAULT.

Standard of review regarding sufficiency of the evidence.

Evidence is sufficient to convict if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency of evidence challenge is reviewed de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The standard of review for a sufficiency of the evidence claim in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Homan*, 181 Wn.2d at 106. A defendant challenging the sufficiency of the evidence

admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Id.* at 106.

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks,* 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross,* 180 Wn.2d 664, 327 P.3d 660 (2014).

Argument.

Deadly weapon.

The defendant claims there was insufficient evidence to convict him of the second degree assault because the prosecution did not establish he intended or used the sword as a deadly weapon. App. Br. at 5.

The second degree assault statute under which the defendant was convicted provides:

> 1) A person is guilty of assault in the second degree if he or she … [i]ntentionally assaults another with a deadly weapon.

RCW 9A.36.021(1)(c).[5]

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[5] The jury was instructed regarding the second degree assault under instruction number 8. CP 68.

The trial court defined assault as:

> an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
>
> An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP 69; *see State v. Miller*, 197 Wn. App. 180, 186, 387 P.3d 1135 (2016), *review denied,* 188 Wn.2d 1005 (2017) ("Washington defines assault according to the common law and recognizes three alternative means for committing assault: battery, attempted battery, and creating an apprehension of bodily harm").

RCW 9A.04.110(6),[6] provides, and the jury was instructed, that deadly weapon means:

> any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.[7]

Substantial bodily harm[8] is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ,

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[6] Under this statute, there are two categories of deadly weapons: per se deadly weapons (any explosive or loaded or unloaded firearms) and deadly weapons in fact ("any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." *See In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011).

[7] The court defined deadly weapon in the same manner under instruction number 12. CP 72.

[8] *See e.g. State v. McKague,* 172 Wn.2d 802, 805–06, 262 P.3d 1225 (2011) (evidence that an employee suffered a concussion without loss of consciousness, a scalp contusion and lacerations, severe head and neck pain were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement); *State v. Hovig,* 149 Wn. App. 1, 5, 202 P.3d 318 (2009), (bruising caused by teeth marks lasting up to two weeks constituted substantial bodily injury); *State v. Ashcraft,* 71 Wn. App. 444, 455, 859 P.2d 60 (1993), (bruises from being hit by a shoe were temporary but substantial disfigurement).

or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b); *see also* CP 73 (instruction number 13).[9]

Here, the sword is not a per se deadly weapon;[10] thus, the inherent capacity and "the circumstances in which it is used" determine whether the weapon was deadly. RCW 9A.04.110(6). "The test is not the extent of the wounds actually inflicted." *State v. Cobb*, 22 Wn. App. 221, 223, 589 P.2d 297 (1978). "Rather, the test is *whether the knife was capable of inflicting life threatening injuries under the circumstances of its use*." *Id* at 223 (emphasis added). Circumstances include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *State v. Sorenson,* 6 Wn. App. 269, 273, 492 P.2d 233 (1972); *see State v. Holmes*, 106 Wn. App. 775, 781-82, 24 P.3d 1118 (2001).

For example, in *State v. Thompson,* 88 Wn.2d 546, 564 P.2d 323 (1977), the defendant used a pocketknife with a blade two to three inches in

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[9] At the defendant's request, the trial court also instructed the jury on self-defense. RP 189-90; CP 76 (*see* WPIC 17.03 lawful force – detention of person); CP 75 (*see* WPIC 17.05 lawful force – no duty to retreat); CP 74 (*see* WPIC 17.04 lawful force –actual danger not necessary). In addition, the defense attorney argued, in part, that the defendant acted in self-defense during his closing argument. RP 206, 212, 216-17.

[10] In the present case, the sword has been designated as EX. P-2; however, pursuant to RAP 9.8(b), the exhibit will not be transferred to the Court unless directed to do so.

length to assault the victim during a robbery. The defendant held the knife against the victim's neck, and the victim sustained bruises on her right arm and a cut on her neck. Given these circumstances of the knife's use, our Supreme Court held that the jury could have properly found that the knife was a deadly weapon. *Thompson,* 88 Wn.2d at 550.

Similarly in *State v. Barragan,* 102 Wn. App. 754, 761, 9 P.3d 942 (2000), several inmates found and exchanged blows, with the defendant threatening to kill the victim. At one point, the defendant picked up a pencil from the floor and swung it toward the victim's eye. The victim blocked the first blow but only deflected a second blow, which embedded the pencil into the victim's temple. This Court held that a reasonable trier of fact could find that the pencil, as it was used, was a deadly weapon. *Id.* at 761-62.

Also, in *Holmes, supra,* the court held that a utility knife was a deadly weapon in the manner of its use. There, a store manager asked the defendant, who was swearing, to leave the store. The defendant took a utility knife from his pants, held it up with the blade extended at waist level, and told the manager, "come get me" or "try and stop me." 106 Wn. App. at 778. The defendant waved the knife at the store manager before turning and leaving the store with the full grocery basket. During trial, there was testimony regarding the dangerousness of a utility knife.

Likewise, in *Cobb, supra,* the court held that the State presented sufficient evidence that a knife had been used as a deadly weapon where a knife with less than a three-inch blade caused a cut over the sternum bone, a cut to the forehead, and a cut in the muscle of the left arm. 22 Wn. App. at 223. Although the injuries were not life threatening, the court reasoned that a reasonable jury could have found that the knife was a deadly weapon, in part, because it could "inflict a penetrating wound to the chest cavity and endanger major structures." *Id.* at 223-24

In like manner, in *Sorenson, supra,* the defendant and victim were at a bar. The defendant told the victim "I'm going to give you a drink… I'm going to give you a drink of blood." 6 Wn. App. at 270. The defendant subsequently grabbed the victim by the throat, held a 1½-inch bladed penknife, and knocked the victim to the floor. The victim suffered a life-threatening laceration to his neck. *Id.* at 270. The court ultimately found sufficient evidence could support the jury's find that the bladed penknife was a deadly weapon. *Id.* at 273.

In the present case, viewing the facts in the light most favorable to the State, and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from it, a rational trier of fact could conclude there was sufficient evidence to support the jury's conclusion that the sword was readily capable of causing death or substantial bodily harm under the

circumstances of its use. The record reflects that the defendant was angry with Mr. Parker regarding the on-going circumstances preceding the incident. He lunged at Mr. Parker, with sword in hand, and then thrust the sword downward toward Mr. Parker. This caused Mr. Parker to retreat backward to avoid injury.

Mr. Parker subsequently grasped the sword and sustained a wound to his hand. The sword was sharp enough to cause a laceration to Mr. Parker's hand. A jury could have reasonably concluded the sword was readily capable of causing death or substantial bodily injury had the defendant been successful in using it against a vital area such as the throat, chest, eye, or abdomen, it certainly could have caused at least substantial bodily injury. While perhaps a stab directly to the forehead may not have penetrated the skull, a blow with equal force directed at Mr. Parker's throat area could have easily reached an artery. Likewise, a stab to the chest, but for the fortuitous grabbing of the sword, could have inflicted a penetrating wound to the chest cavity or major blood vessel.

Mr. Parker testified that as a result of the laceration on the palm of his hand, he was in a great deal of pain after the event. EX. P5, P6, P7. Based upon this testimony, a jury certainly could have concluded the defendant caused a temporary but substantial loss or impairment of his hand constituting substantial bodily injury.

Assuming, arguendo, that the sword may not have inflicted substantial bodily injury, it is of no consequence. RCW 9A.04.110(6) does not require "actual injury" to establish a particular apparatus as a deadly weapon. Both the "*attempt*" to use the weapon and the "*threatened*" harm with the device, under the appropriate circumstance, can also constitute a deadly weapon. It can be reasonably inferred that the defendant attempted to use the sword and also threatened the victim with it by his lunging motion and his downward thrust of the weapon.

Intent.

The defendant also argues the evidence did not allow the jury to find that he acted with the intent or had present ability to use the sword as a deadly weapon. App. Br. at 6-7. Specifically, the defendant argues: "Critically, the State did not introduce evidence regarding Mr. Cerutti's intent as to the *use* of the sword, the amount of force used, or even that amount necessary to actually cause harm." App. Br. at 7 (emphasis in the original).

The trial court defined intent under instruction number 11 as "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." *See* RCW 9A.08.010(1)(a).

A rational trier of fact viewing the evidence in the light most favorable to the State could have concluded that the defendant not only had the requisite intent and present ability to use the sword, but he acted on that intent. The fact that the defendant was disarmed and prevented from inflicting serious bodily injury does not negate his intent to use the sword as a deadly weapon.[11] Certainly, it can be inferred that the defendant's earlier actions of taunting and spitting at the victim, the victim's argument with the defendant's wife, the defendant ordering his wife into their residence, and the defendant's subsequent acts of retrieving the sword and immediately advancing and "lunging toward" the victim with it, and his several "downward chopping" movements with the sword at Mr. Parker established his intent to use the sword as a deadly weapon. Under the circumstances in which the sword was used, attempted to be used, or threatened to be used, it was readily capable of causing death or substantial bodily harm as evidenced by the laceration to Mr. Parker and as discussed above. This claim has no merit.

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[11] The defendant's argument is akin to an individual who points and discharges a firearm at an individual, misses, and then claims he did not intend to shoot at or injury the person. The fact that the bullet missed the intended victim does not negate the ability to find he intended to hit the victim.

B. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

The trial court determined the defendant to be indigent for purposes of his appeal on September 22, 2016. CP 140-41. The State is unaware of any change in the defendant's circumstances. Should the defendant be unsuccessful on appeal, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

The evidence admitted at trial was sufficient for any rational trier of fact to find beyond a reasonable doubt that the sword was a deadly weapon. Accordingly, the State respectfully requests that this Court affirm the defendant's conviction for second degree assault.

Dated this 29 day of June, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. CARLO CERUTTI, Appellant.	NO. 34574-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 29, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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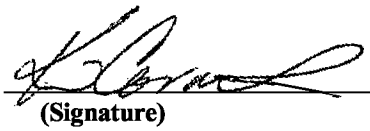
6/29/2017 (Date) Spokane, WA (Place)  (Signature)

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